Truckload Carriers Association

(formerly known as the Interstate Truckload Carriers Conference)

OA 28153

October 27, 1997

Docket Clerk
U.S. Department of Transportation
Room PL - 401
400 Seventh Street, S.W.
Washington, DC 20590 - 0001

RE: Docket No. FHWA 97 - 2759-43
English Language Requirement;
Qualifications of Drivers

Dear Sir or Madam:

The Truckload Carriers Association ("TCA" or "Association", formerly known as the Interstate Truckload Carriers Conference) submits the following comments in response to the referenced Advance Notice of Proposed Rulemaking, appearing at 62 Fed. Reg. 45200 (August 27, 1997), issued by the Federal Highway Administration ("FHWA"). The notice solicits comment on the existing regulation providing that an individual is not qualified to operate a commercial motor vehicle unless possessing a sufficient ability to read and speak the English language, which regulation is alleged to be impermissibly vague, overbroad, and capable of discriminatory application. FHWA seeks comment on a number of issues that it hopes will allow it to fashion an unobjectionable replacement.

I. Identity of Commentor

TCA is the only national trade association representing the irregular-route truckload segment of the motor carrier industry. The Association represents more than 950 members, including dry van, refrigerated, flatbed, and dump trailer carriers domiciled in the 48 contiguous states and serving those states, Alaska, Mexican states, and the Canadian provinces. The truckload segment of the motor carrier industry operates more than 200,000 tractors and 400,000 trailers which are operated by more than 350,000 competent and qualified commercial motor vehicle operators who are subject to the regulation being reviewed. Even with the industrywide driver shortage, which places a premium on expeditious hiring of qualified drivers, motor carriers are sensitive to the safety implications of the Federal Motor Carrier Safety Regulations ("FMCSRs"), including the regulation that is the subject of the referenced notice, and are careful not to compromise highway safety in adhering to them.

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II. The Current Regulation Is Unobjectionable

The regulation under review, found at 49 C.F.R. 391.11 (b) (Qualifications of Drivers), provides that an individual may only operate a commercial motor vehicle if, in pertinent part, he or she is able to

> " . . . read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;"

The foregoing regulation appears not in an enforcement portion of the FMCSRs, but rather in Subpart B, which governs qualification and disqualification of drivers. A driver's ability to comply with this provision, just as his or her ability to comply with other driver qualification criteria found in Section 391.11(b), is within the province of a potential motor carrier employer to decide. Almost all of those criteria are wholly objective, such as the requirements that drivers be at least 21 years of age (391.11(b)(1)); that they be physically qualified (391.11(b)(6)); that they furnish an executed application for employment as prescribed (391.11(b)(11)); and that they not be disqualified, such as, for example, for driving while under the influence of alcohol; for refusing to submit to required testing; or for leaving the scene of an accident while operating a commercial motor vehicle (391.11(b)(9)). Some Section 391.11 (b) criteria are somewhat less objective, such as familiarity with methods and procedures for securing cargo (391.11(b)(4)), and the ability to safely operate the type of commercial motor vehicle he or she drives (391.11(b)(3)).

Whether subjective or objective, the determination of whether a driver is sufficiently qualified to drive in accordance with the FMCSRs is one properly made by the motor carrier evaluating the qualifications presented by a driver applicant. As FHWA concedes in its notice, " . . . section 391.11 was originally intended to be enforced through the motor carrier employer, i.e., it was the employer's responsibility to evaluate the driver's proficiency with the English language in the context of his or her duties and responsibilities." 62 Fed. Reg. 45200. FHWA observes that the rule, when promulgated, was not intended to be enforced at roadside. Even the resolution adopted by Working Group One of the Land Transportation Standards Subcommittee constituted by the North American Free Trade Agreement places responsibility jointly on the driver and the motor carrier to ensure that communications in the country in which they operate can be effective without compromising safety.

III. No Practical Difference Exists Between The Extant and A Contemplated Regulation

Motor carriers are able to shoulder their obligation of determining whether driver applicants can read and speak appropriately in order to perform the essential functions of

their jobs, including, as provided by regulation, conversing with the general public, understanding highway signs and signals, and making entries on reports and records. While TCA appreciates the desire of FHWA to replace the extant regulation with one that requires that drivers possess the basic functional communications and comprehension skills necessary to ensure safety, we fail to see in FHWA's proposal any significant departure from the extant regulation that offers additional protection for highway safety; in fact, it may offer less.

FHWA claims to want to replace the general requirement that drivers exhibit English proficiency or a working knowledge of English with a set of standards "which require knowledge of the English language." This is a semantic distinction with little if any substantive difference. The motor carrier industry cares little about whether a driver has proficiency in or knowledge of English, but does place great weight on the ability of a driver to perform the necessary functions required of the position, which as a practical matter requires knowledge of the English language, the tenet of the existing rule.

The extant rule requires that drivers possess sufficient written and verbal English skills to be able to converse with the general public; understand highway signs; respond to official inquiries; and make entries on reports and records. To these broad duties can be added examples of the general requirement that drivers be able to converse with the general public and respond to official inquiries. Such illustrations requiring knowledge of the English language, by way of example only, include (1) the ability to interpret and explain shipping documents to verify their accuracy; (2) the ability to ask for and comprehend travel directions and routing instructions; and (3) the ability to explain and understand equipment operation and malfunction, so that roadside safety inspectors are satisfied that safe equipment is being operated, and so repair stations can assess any needed repairs. The foregoing are only three examples of the minimum and most fundamental performance-oriented tasks that are directly and necessarily related to the task of operating a commercial motor vehicle, and which an individual must have the capacity to perform in the English language before a carrier accepts that individual as qualified to operate a motor vehicle. It is simply beyond belief how an individual can engage in or understand the requisite communications demanded of him or her without possessing a functional grasp of English.

The issue raised by the American Civil Liberties Union's ("ACLU") letter, referenced to in the Federal Register notice, concedes that basic level English fluency is necessary to the actual task of operating a motor vehicle. While some arbitrary enforcement of the regulation may occur, a performance-based regulation as suggested by FHWA would not cure the potential for arbitrary enforcement that is feared by ACLU. In fact, the matter that apparently gave rise to ACLU's interest, involving a citation issued to a driver who stopped for a routine commercial vehicle inspection in New Jersey, illustrates the necessity of being able to respond to official inquiries, as is currently required. Moreover, the judge in the reported incident dismissed the citation against the driver, illustrating the apparent absence of any factual foundation for the alleged violation of the regulation. In fact, it is widely held by jurisdictions around the country that any

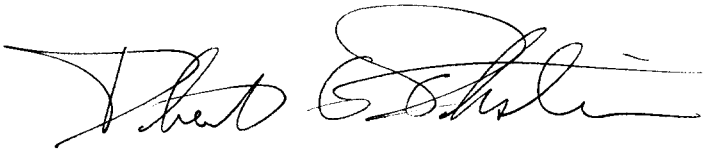
need to offer a language other than English is an issue to be resolved by a jury or other trier of fact. See, e.g., Campos v. Firestone Tire and Rubber Co., 485 A.2d 305 (N.J. 1984).

IV. Safety Considerations Are Paramount

ACLU's objection is by way of analogy similar to an alleged violation of 49 C.F.R. 391.11(b)(3) (providing that a person is qualified to drive a commercial motor vehicle if, by reason of experience, training, or both, that person can safely operate such a vehicle) where the driver is observed by an enforcement officer to be weaving along a highway. A factual determination of the circumstances will resolve any alleged violation of the FMCSRs, but the regulations serve an important purpose in setting a high and redundant standard of highway safety for the protection of all highway users. It is critically important that commercial vehicle operators be able to safely operate their vehicles and be able to understand the additional and necessarily related aspects of operation, such as conversing, understanding, and responding, as provided for by the current regulation. To the extent that an individual enforcement officer believes an FMCSR has been violated, it is generally left to that officer's discretion to issue a citation, and the judicial process may or may not support that decision. While not philosophically imposed to a change in the regulation, TCA suggests that any movement toward a performance-oriented regulation, as suggested by FHWA, will ultimately lead to a provision substantively similar to the existing one.

Should this proceeding be pursued, TCA suggests that FHWA be receptive to the many and varied tasks besides driving that involve the operation of a commercial motor vehicle, some of which are illustrated here, and all of which require a working knowledge of English and a clear ability to communicate in a variety of situations. FHWA should be reminded also of its recognition that the regulation at issue was originally intended not to be an enforcement tool, but to be a guideline for motor carriers to use in determining whether driver applicants are qualified to drive. We believe the current regulation satisfactorily addresses highway safety concerns.

Respectfully submitted,



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